No. 15778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYON FURNITURE MERCANTILE AGENCY,

Appellant,

vs.

IRENE M. CARRIER, doing business as WISHMAKER HOUSE,

Appellee.

APPELLANT'S REPLY BRIEF.

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Counsel for the appellant believe that the jurisdiction of the Court to hear and determine this appeal, the statement of the case, the factual situation and the questions involved in this appeal have been fairly well stated and settled by the Appellant's Opening Brief and the Appellee's Reply Brief. The appellant does, however, desire to make some comment upon the Reply Brief of the appellee filed herein and does desire to point up the appellee's apparent inability to sustain the judgment given by the Court below either factually or as a matter of law.

I.

Does the Case of Jefferson v. Stockholders Publishing Co., 194 F. 2d 281, Dispose of the Question of the Necessity to File a Cost Bond by a Plaintiff in a Libel Suit as Required by Section 830, Code of Civil Procedure of the State of California?

Appellee seems to contend that the case of *Jefferson v. Stockholders Publishing Co.,* 194 F. 2d 281, disposes of the necessity of a plaintiff in a libel suit being required to file a bond as provided by Section 830 of the California Code of Civil Procedure.

Counsel for the appellant do not believe that the case so holds. Counsel for the appellant believe that a careful reading of the case will disclose that the case was reversed by reason of the *failure of the clerk of the Court to issue a summons at the time of the filing of a complaint* as is required by Rule 4(a) of the Federal Rules of Civil Procedure in all civil cases including actions for libel, and that the necessity for the filing of a bond was not the point in issue but rather the failure of the clerk of the Court to issue the summons as provided by the Rule.

In any event, counsel for the appellant believe that a clear cut decision by the Appellate Court on the question of whether or not it is necessary to file a bond as required by Section 830 of the Code of Civil Procedure at the time of the filing of a complaint for libel in order to maintain such an action would be of great help and assistance for the fuutre guidance of the Judges of the Lower Courts, litigants and counsel in future similar matters.

II.

Is the Appellate in This Matter a Mercantile Agency, and Does It Follow That Its Reports Are Therefore Qualifiedly Privileged and That the Privilege Cannot Be Destroyed by Negligence and That Negligence Cannot Be Substituted for Malice?

Counsel for the appellant believe that there is no dispute between the parties concerning the facts in this case and that the points involved are purely legal. There is no question of what the Lyon Furniture Mercantile Agency did in this matter in the making of its mercantile reports and to whom they were made and when and under what circumstances they were made. These facts are all fully and clearly set forth in the Transcript of Record, in the exhibits and in the Opening and Reply Briefs of the parties, and it is a question of law whether the reports by Lyon Furniture Mercantile Agency were in fact libelous and that therefore damages follow.

The evidence clearly and unequivocally shows that the reports made by Lyon Furniture Mercantile Agency of and about the appellee come squarely and fully within the provisions of Section 47, Subdivision (3) of the Civil Code of the State of California.

That being the case "malice is not inferred from the communications", Section 48, Civil Code of the State of California.

The law in California being as above indicated and the Court below having failed to find on material issues as pointed out in Appellant's Opening Brief and especially on the question of malice, counsel for the appellee seeks to justify the failure to find on material issues and asks this Court to destroy the protection offered Mercantile

Agencies by Section 47, Subdivision (3) of the Civil Code of the State of California and Section 48 of the Civil Code of the State of California by finding that the appellant was "grossly negligent" in making the reports that are the basis of appellee's claim, and that such "gross negligence" infers malice and destroys the "qualified privilege" afforded Mercantile Agencies by the above quoted Sections of the Civil Code of the State of California.

The foregoing in essence is the position of the appellee, and in support of that position appellee cites the case of *Douglas v. Daisley,* 114 Fed. 628 (decided in 1902), as the only case he can find as being "precisely in point to the one at bar" according to Appellee's Reply Brief.

However, the *Douglas v. Daisley* case *supra,* is not a California case nor is it the law of the State of California nor has it been followed in other and later cases as will be hereinafter set forth.

Assuming, without admitting, that the reporter (an employee of the appellant) who created the reports for the appellant concerning the appellee were prepared "in a grossly negligent manner", such "gross negligence" under California Law would not destroy the privilege nor would it infer malice. See *Davis v. Hearst,* 160 Cal. 143 at 167, 172 and 173, cited on page 24 of Appellant's Opening Brief for the pertinent statement concerning negligence as a basis for malice, reading as follows:

> "But the truth is that mere negligence or mere carelessness can never be evidence of malice in fact. In the same act they cannot even co-exist. Malice necessarily imports an evil purpose. Negligence necessarily implies an absence of intent or purpose.

"Mere inadvertence or forgetfulness or careless blundering is not evidence of malice, nor is negligence or want of sound discretion nor the mere fact that the statement is not true."

In the case of *Johns v. Associated Aviation Underwriters,* 203 F. 2d at page 208 (decided in 1953), the plaintiff Johns lost his position as an aviation pilot by reason of a report on his qualifications issued by the defendant Associated Aviation Underwriters (a case similar to our California case of *Freeman v. Mills,* 97 Cal. App. 2d 161, wherein the plaintiff lost his position as an assistant starter at the Santa Anita Race Course by reason of a report concerning Freeman issued by one of the defendants in that case, Thoroughbred Racing Protective Bureau, Inc.).

The plaintiff Johns charged that the communication or report that was sent by the defendant Associated Aviation Underwriters that resulted in his losing his job *"was made with such gross indifference* to appellant's rights *as to amount to a wilful or wanton act."* The evidence, among other things, also showed "that the derogatory statements concerning the appellant were based *upon only two telephone calls* to persons who had known or been associated with him." (The italics do not appear in the foregoing quoted text but are added by counsel for emphasis.)

The communication was held to be privileged and judgment went for defendant Associated Aviation Underwriters, and on the question of whether malice might be inferred from "gross indifference to the rights of appellant as would amount to wilful or wanton conduct from which malice might be inferred" the Court cited a portion

of the case of *Express Publishing Co. v. Wilkins,* 218 S. W. 614, reading as follows:

> *"Negligence cannot take the place of actual malice.* The inference to be drawn from the *proof of gross negligence cannot be substituted for proof of actual malice so as to destroy the immunity from damages given to a privileged publication."* (The italics do not appear in the quotation but are used by counsel for emphasis.)

The Court of Appeals for the Fifth Circuit in the foregoing case affirmed a judgment in favor of the defendant Associated Aviation Underwriters, the appellee herein.

In the case of *Express Publishing Co. v. Wilkins, supra,* the phrase "gross negligence" was used in an instruction to the jury on the defense of privilege instead of instructing on actual or express malice as a condition to newspapers liability, and this instruction was held erroneous and the judgment against the newspaper was reversed by the Appellate Court stating:

> "In an action for libel by the police judge of a city against a newspaper on account of its article, privileged under Rev. St. 1911, art. 5597, charging that the judge and chief of police had been lax or corrupt in failing to suppress gambling and prostitution at the instance of army officers, an instruction in relation to the defense of privilege, which, instead of speaking of actual or express malice as a condition to defendant newspaper's liability, spoke of gross negligence, and predicated liability thereon, was erroneous."

The very late case of *H. E. Crawford Company v. Dun & Bradstreet, Inc.,* 241 F. 2d p. 387 (decided

by the Fourth Circuit Court of Appeals January 8, 1957) in the opinion of counsel for appellant is not only decisive of the law in this case as it was in that case (because apparently the law of libel—privilege and malice is the same in North Carolina as it is in California), but also because it disapproves specifically of the case of *Douglas v. Daisley, supra* (see pages 397 and 398 of *H. E. Crawford Company v. Dun & Bradstreet, Inc., supra*) and because it specifically holds that:

> "Under North Carolina law, *negligence was not the equivalent of and could not be substituted for actual malice* in determining whether a Mercantile Agency's untrue financial report to interested subscribers lost its qualified privilege." (Italics added by Counsel.)

and in the California case of *Davis v. Hearst, supra,* our Supreme Court held to the same effect legally as is the legal effect of the foregoing quotation from the *Crawford v. Dun & Bradstreet* case, *supra.*

III.

The Question of Damages Awarded by the Lower Court.

Counsel for appellee states that the damages are clearly supported by the evidence.

With the foregoing conclusion and statement of counsel for the appellee the appellant respectfully disagrees.

Reference is made by counsel for the appellant to the law on damages and the evidence *re* damages in this case fully set forth in Appellant's Opening Brief on pages 26, 27 and 28 thereof.

While damages in substantial amounts are given from time to time in libel and slander suits where the facts,

proof and the law justifies them, such is not the instant case before the Court.

By reason therefore of the facts and the law in this case as set forth herein and in Appellant's Opening Brief, it is respectfully urged that this Court reverse the judgment herein and direct judgment in favor of appellant for costs as provided by Rule 59 (a-2) of the Federal Rules of Procedure.

Respectfully submitted,

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